IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE A.K.BASHEER

FRIDAY, THE 16TH NOVEMBER 2007 / 25TH KARTHIKA 1929

OP.No. 6399 of 2003(J)

PETITIONER:

DR.CINI ACHUTHAN, W/O.E.S.VALSAN,
AGED 32 YEARS, RESIDING AT "SAPNA",
UNITY ROAD, THRIKKAKARA P.O., KOCHI - 21.

BY ADV. SRI.M.R.RAJENDRAN NAIR (SR.)
SRI.R.SREERAJ
SRI.SUNILNATH
SRI.HARIRAJ
SRI.SURAJ.S
SRI.P.A.KUMARAN
SMT.ANSU COTTAGIRI VARGHESE

RESPONDENTS:

1. STATE OF KERALA, REPRESENTED BY THE CHIEF SECRETARY, SECRETARIAT, THIRUVANANTHAPURAM.

2. COCHIN UNIVERSITY OF SCIENCE AND TECHNOLOGY REPRESENTED BY THE REGISTRAR, COCHIN UNIVERSITY P.O., KOCHI - 22.

3. M.ANAND, (RESIDENTIAL ADDRESS NOT KNOWN) C/O. THE REGISTRAR OF COCHIN UNIVERSITY OF SCIENCE AND TECHNOLOGY, KOCHI-22.

BY ADV. SRI.S.GOPAKUMARAN NAIR, SC, COCHIN UTY.
SRI.PAULY MATHEW MURICKEN
SRI.A.A.ABUL HASSAN,SC,COCHIN UNIVERSIT
GOVERNMENT PLEADER SRI.T.B.REMANI

THIS ORIGINAL PETITION HAVING BEEN FINALLY HEARD ON 16/11/2007, THE COURT ON 16/11/2007 DELIVERED THE FOLLOWING:

O.P.No. 6399 of 2003(J)

ORDER ON C.M.P.NO.11369/03, I.A.NOs.15648/03 & 437/05 in O.P.6399/03

Dismissed.

Sd/-
A.K.BASHEER, JUDGE

16.11.07

APPENDIX

PETITIONER'S EXHIBITS:

Ext.P1: True copy of the Notification No.Ad D3 18815/01 dated 19.12.2001 published in Mathrubumi daily dated 31.12.2001.

Ext.P2: True copy of the order No.RECT/06/2002 dated 6.2.2003 issued by the 2nd respondent.

Ext.P3: True copy of the report dated 1.12.1998 submitted to the Syndicate of the 2nd respondent.

RESPONDENT'S EXHIBITS:

Ext.R3(a): A true photocopy of the memo issued by the 2nd respondent University as per proceedings No.Ad.D3/18815/03 dated 1.11.2003 to the 3rd respondent.

Ext.R3(b): A true photocopy of the certificate of Transfer of Charge dated 5.11.2003.

Ext.R3(c): A true photocopy of the appointment order bearing No.Ad.D3/18815/03 dated 10.12.2003 issued by the 2nd respondent to the 3rd respondent.

// True copy //

P.A. to Judge

jes

A.K.BASHEER, J.

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O.P.No.6399 OF 2003

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Dated this the 16th day of November 2007

JUDGMENT

The Cochin University of Science and Technology (for short 'CUSAT') had invited applications from eligible candidates for appointment to the post of Lecturer in the School of Environmental Studies. In the said notification, a copy of which is on record as Ext.P1, it was mentioned that the above post was reserved for Other Backward Community candidates.

2. It is not in dispute that petitioner was placed at rank No.1 in the rank list published by CUSAT. Respondent no.3 was placed at rank No.2. It is also not in controversy that petitioner belongs to Thiyya community and respondent no.3 belongs to Viswakarma community. Both these communities are grouped under Other Backward Communities. Grievance of the petitioner is that the University gave appointment to respondent no.3 overlooking her higher rank position in Ext.P2 list published by the University on February 6, 2003.

3. It is contended by the petitioner that since she belonged to Other Backward Class category for which the post was

reserved and also since she had got rank No.1 in Ext.P2 list she ought to have been given the nod for appointment. She further contends that the sub rotation employed by the University relying on Rules 15, 16 and 17 of Part II Kerala State and Subordinate Service Rules, 1958 is per se unconstitutional, illegal, arbitrary and vitiated. In the process, the petitioner has challenged the validity and constitutionality of the above rules as well. There is a further prayer for issue of a writ of mandamus to the University to appoint the petitioner as Lecturer displacing respondent no.3.

4. The stand taken by the University is that respondent no.3 who is a Viswakarma candidate was given appointment since going by the roster followed by the University on the basis of communal rotation and sub rotation as provided under the rules referred to above, the present vacancy ought to have gone to a Viswakarma candidate since on two earlier occasions the turn available to the said community had to be passed over for want of eligible candidates. On those two occasions candidates belonging to Ezhava/Thiyya community were given appointment. It was therefore that respondent no.3 was given appointment strictly in

conformity with the roster based on rotation and sub-rotation as envisaged in Rules 15 to 17 of Part II Kerala State and Subordinate Service Rules, 1958.

5. While challenging the validity of Rules 15 to 17 of Kerala State and Subordinate Service Rules, 1958, it is primarily contended by learned counsel for the petitioner that the caste-wise reservation among the category belonging to Other Backward Class is ex-facie unconstitutional. It is the case of the petitioner that a sub-rotation or a further reservation on the basis of caste inter se the Backward communities is an anathema to the provisions contained in Article 16 of the Constitution. It is also contended by him that while caste is taken only as an identification mark for backwardness, reservation can be granted only to a backward class and not to any particular class/community. Once a few castes are identified as socially and educationally backward and are grouped as Other Backward Class, a further classification among those categories yet again based on caste, is highly objectionable. Learned counsel has invited my attention to a large number of decisions of the

Supreme Court to buttress his arguments in the line indicated above. The decisions cited before me are **State of Madras V. Sm. Champakam Dorairajan [AIR (38) 1951 Supreme Court 226], B.Venkataramana V. State of Madras [AIR (38) 1951 Supreme Court 229], M.R.Balaji V. State of Mysore [AIR 1963 SC 649] Chitralekha V. State of Mysore [1964 SC 1833], E.V.Chinnaiah V. State of A.P. [2005 (1) SCC 394].**

6. Learned counsel has taken me through the above judgments extensively while contending for the position that a further classification among a group of communities on the basis of caste is not what is envisaged by the Constitution. Undoubtedly, the contention raised by the petitioner is attractive in the sense that neither Article 15 nor 16 apparently permits a further reclassification as among a group of communities which have been identified as socially and economically backward. Article 15 prohibits discrimination on the ground of religion, race, caste, sex or birth and authorises the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled

Castes/Scheduled Tribes. What is mandated under Article 16 is that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state. While conceding that Clause 4 of Article 16 authorises the State to make provision for reservation of posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State, learned counsel contends that the said power or authority given to the State shall not be stretched to the extent of discriminating one caste from among the backward class against another belonging to the same backward class. To put it more plainly, the contention of the petitioner is that sub rotation stipulated in Rules 16 and 17 is patently discriminatory and violative of constitutional mandates. Learned counsel has drawn my attention to several paragraphs from the judgments of their Lordships of the Supreme Court cited above.

7. I do not propose to refer to those observations or dicta laid down in those judgments at this juncture, since in my view Rule 16 and 17 of the Rules have stood the test of time for the

last more than 5 decades. More importantly, the fact remains that the two turns which were available to the candidates belonging to Viswakarma community had to be passed over and those vacancies had been given to Ezhava candidates. While fairly conceding that those two vacancies have to be given to Viswakarma community, learned counsel however contends that Ext.P1 notification did not indicate such a contingency at all when applications were invited. It cannot be assumed that the University was not aware of the two turns which were denied to Viswakarma community and that the next turn should go to the said community. This should have been indicated in Ext.P1 notification itself. It is also pointed out by the learned counsel that even at the time when Ext.P2 rank list was published, the University had no such case. It was only in the statement filed before this court that the University had taken up the stand for the first time that the available vacancy should be given to Viswakarma candidate. It is further contended by the learned counsel that petitioner was placed at rank No.1 on the basis of her merit. The superior rank position obtained by petitioner

ought to have been recognised.

8. Per contra, it is contended by learned Standing Counsel for the University that the practice that was being followed while notifying the vacancy was only to indicate the common category of community to which the vacancy was being earmarked. It was only at the time of making the appointment the University was bound to follow the roster. It is pointed out by the learned Standing Counsel that petitioner had no case that going by the roster the turn should not go to Viswakarma community. It is true that the learned counsel for the petitioner has taken up such a contention in her affidavit filed in support of the interlocutory application. In this context, learned Standing Counsel invites my attention to clause 4 in Ext.P1 notification which clearly indicates that the selection will be on the basis of the communal rotation as prescribed in Rule 15 to 17 in Part II K.S.&S.S.R.

9. Coming back to the challenge of constitutionality of the above Rules in the back drop of the above factual position, I am of the view that the petitioner is not entitled to get any relief particularly for the reason that the petitioner has not been able to

substantiate as to how sub rotation envisaged under Rule 16 and 17 is unconstitutional or invalid. Having perused the judgments of the Supreme Court in the cases referred to above, I am unable to subscribe to the view advanced by the petitioner.

10. The next contention raised by the petitioner is that the case of "compensatory appointment" now put forward by the University is totally illegal and unsustainable. It is contended by the petitioner that the qualifications and selection procedure prescribed for the post of Lecturer in the UGC stream and AICTE/self financing are totally distinct and different. The specific contention of the petitioner is that even assuming the two turns available to the Viswakarma and self financing schemes were passed over, a "compensatory appointment" in the UGC stream should not have been given to a Viswakarma community candidate. But learned Standing Counsel would contend that the rules of reservation followed by the University are as provided in K.S. & S.S.R. Those rules are applied to all posts of Lecturers both under the self financing stream or under the general category. In this context, learned counsel for the petitioner has

invited my attention to the decision reported in **Dr.Chakradhar Paswan V. State of Bihar [(1988) 2 SCC 214]**. Laying heavy emphasis on the observations made by their lordships in paragraph 10 of the above judgment, it is contended by the learned counsel that the post in question which was notified in Ext.P1 would fall under the general category (UGC scheme) whereas either under AICTE or the self financing stream the selection procedure and the other norms of selection are totally at variance. Petitioner cannot aspire for any post other than the subject in which she has acquired requisite qualification and therefore the University was not justified in bringing the theory of "compensatory appointment" in the case.

11. It may be true that the petitioner was in the dark at the time when she applied for the post pursuant to Ext.P1 notification also as regards "community turn" to which the post would have been available. Similarly, the petitioner cannot be held guilty of laches in not taking up the issue at the time when the notification was issued with reference to the above aspect. But still the fact remains that the selection process was completed in the year

2003 and this writ petition was filed only at the time when appointment was due to be made. It is on record that respondent no.3 had joined service in May 2003 itself. Her probation was declared and thereafter she was confirmed in service after obtaining concurrence of the Government on February 17, 2005. It is true that the appointment of respondent no.3 has been made subject to the result of this original petition. Since I have already taken a view that the validity of Rules 15 to 17 of Part I KS & SSR cannot be called in question at this distance of time and also for the particular reason that the respondent no.3 had been appointed and she had been continuing in service eversince. I am afraid that petitioner cannot be granted any relief in this writ petition.

12. Learned counsel for respondent no.3 has invited my attention to the decision reported in **Cochin University of Science and Technology V. Mohammed Aslam [1996 (1) KLT 214]**. The Division Bench had considered an almost identical issue in he above case and taken the view that the wording of Rule 15(c) which states that the benefit of the turn

forfeited to a particular community or to a group of community should be compensated at the earliest possible opportunity is perfectly legal and valid. If a suitable candidate is not available from the community as per the turn fixed by the rules at a particular point of time, the community should not lose that vacancy for ever. The said community must get back the benefit from those communities which secure the benefit, at the earliest point of time. In **Pradeep V. Joseph Zacharias [2001 (3) KLT 765]** another Division Bench of this court also upheld the validity of the above Rule. In the latter decision, the validity of the above Rule was considered in the light of Article 16(4) of the Constitution.

Having regard to the entire facts and circumstances, I do not find any merit in the contentions raised by the petitioner. Original petition fails and it is accordingly dismissed.

(A.K.BASHEER, JUDGE)

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A.K.BASHEER, J.

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O.P.No.6399 OF 2003
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JUDGMENT

Dated, 16th November 2007